

## MACKUBIN v. BROWN.

In a creditor's suit the decree for a sale of the realty, being founded on the fact of the insufficiency of the personal estate, necessarily establishes that point; and, consequently, after that, the correctness of the administrator's accounts cannot be impeached for the purpose of turning a creditor, who had come in under the decree, away from the realty to seek payment of the personalty.

After the notice to creditors had been given, a sale had been made, and a distribution of the proceeds had been awarded to creditors, claimants, who had been infants, were allowed to come in soon after they attained their full age, and to have a further sale of the realty made for the satisfaction of their claims; and that too, after a partition had been made of it among the heirs of the deceased debtor.

A trustee, under a decree for the sale of property, who fails to bring into court, or to account for the proceeds of sale, or the bonds and notes taken by him to secure the payment of the purchase money, may be charged with the whole amount of the proceeds according to his report of the sales. But, by thus holding the trustee liable, the court does not thereby virtually exonerate any one else.

A trustee cannot be permitted to apply a part of the proceeds of sale without any authority from the court, and then to come in to have it allowed as a set off against the claim of the party to whom it was paid.

It appears, that *William Hammond* of Ann Arundel county, by his will and codicil, made on the 24th March 1807, after devising several parcels of his land to particular persons, and emancipating some of his negroes, directed, that all the residue of his real estate should be sold by his executors for the payment of his debts; and the surplus of the proceeds to be invested and applied in satisfaction of legacies, as therein specified among the children of his sisters; and he appointed *Basil Brown* and *William H. Marriott* his executors. After which he died; his will was proved according to law; and, on the 7th of October 1807, his executors by a note addressed to the register of wills renounced the executorship; (a) and administration, with the will annexed, was immediately granted to *Basil Brown*. And, on the same day, *Basil Brown* filed his petition in this court, stating these facts and alleging, that he was interested in the estate as appeared by the will, and prayed that a trustee might be appointed to carry the will into effect.

Whereupon, and according to the act of assembly, (b) a decree was passed *ex parte*, on the 12th of October 1807, directing the real estate of the late *William Hammond* to be sold; and *Basil*

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(a) 1798, ch. 101, sub-ch. 3, s. 7; Dep. Com. Gui. 69; 3 Bac. Abr. 43.—(b) 1785, ch. 72, s. 4.